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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-118

STATE OF NEW JERSEY,
Petitioner,

vs.

ERNEST RICHARD PACE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The Petitioner, the State of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on April 22, 1975.

Opinions Below

The opinion of the Supreme Court of New Jersey is reported at 67 N. J. 222, 337 A. 2d 33, and is reproduced

here as Appendix A. The opinion of the Appellate Division of the Superior Court of New Jersey is reported at 127 N. J. Super. 55, 316 A. 2d 61, and is reproduced here as Appendix B.

Jurisdiction

The judgment of the Appellate Division of the Superior Court was entered on February 20, 1974. The judgment of the Supreme Court of New Jersey, which reversed the conviction of respondent, was entered on April 22, 1975. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

I. Does the interview of a parolee, then in custody on an unrelated criminal charge, by his parole officer, who is acting in the normal course of his duties and who does not have general law enforcement responsibilities, constitute "custodial interrogation" within the meaning of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), so that the statements of the parolee may not be introduced into evidence at his subsequent criminal trial unless the parole officer complies with the prophylactic requirements of *Miranda*, where the statements are voluntary and reliable and the parole officer in no way oppresses or harasses the parolee?

II. Does the exclusionary rule of *Miranda*, as refined and explained in *Harris* v. *New York*, 401 U. S. 222 (1971), require that the only purpose for which the prosecution can employ a defendant's voluntary and uncoerced, though *Miranda* violative, statement is to impeach the de-

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fense position at trial, or does the exclusionary policy extend only to the prosecution's case in chief so that the statement, once introduced as proper rebuttal of the defense, may be considered by the jury as substantive evidence, thereby serving the fundamental objective of a criminal trial, to arrive at the truth, without lessening the deterrent impact of the exclusionary rule?

III. Should the holding in *Harris* v. *New York* be so rigidly and artificially limited that the prior statements of a defendant, obtained in violation of *Miranda* but otherwise voluntary, may not be introduced to rebut the flatly contradictory position asserted by the defense at trial merely because defendant did not personally testify falsely but suborned others to do so in his behalf?

Constitutional Provisions Involved

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statement of the Case

This is a petition for a writ of certiorari to review a decision of the Supreme Court of New Jersey which reversed respondent's conviction for armed robbery.* At issue are several important questions regarding the application and scope of *Miranda*. The material facts which occasioned these questions are not in dispute.

Mr. Joseph Celona, the victim of the crime, testified that he resided at 50 West Adams Avenue in Pleasantville with his sister and their elderly parents. He was the proprietor of a small grocery store located across the street from his residence. On October 2, 1968, Mr. Celona first encountered the respondent who entered the store and browsed around while Mr. Celona was waiting on a customer. After the customer left, respondent purchased a bag of potato chips and then departed.

Mr. Celona next met respondent at approximately 9:30 p.m., on October 4, 1968. At that time, Mr. Celona was

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* N.J.S.A. 2A:141-1 provides:

> Any person who forcibly takes from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

N.J.S.A. 2A:151-5, in pertinent part, states:

> Any person who commits . . . robbery . . . when armed or having in his possession any firearm . . . shall, in addition to the punishment provided for the crime, be punished on a first conviction by imprisonment for not less than one nor more than 10 years . . . in the discretion of the court.

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in the dining room of his home and was engaged in checking the proceeds and bills from his store. The store money, between $1200 and $1500 in cash and checks, was in a bag on the dining room table. Hearing a knock at the door, Mr. Celona went to answer it. Upon opening the door, he saw defendant Davis who asked: "Do you own the store?" Simultaneously with this question, Davis pulled the door all the way open and respondent rushed in holding a shotgun. Respondent stood near Mr. Celona and announced: "This is a stick-up." Mr. Celona attempted to wrest the shotgun from respondent, who backed away saying, "Don't move or I'll shoot." At that point, Mr. Celona's parents came to the doorway of the room and Mr. Celona took a protective position in front of them. Defendant Davis in turn walked over and stood directly in front of Mr. Celona. In response to an order by respondent, Davis produced a small black gun from under his clothing. After grabbing Mr. Celona's father by the arm, Davis stepped to the table, picked up the money and fled from the house. Respondent remained behind, pointing the shotgun at Mr. Celona and his parents. After a short time, respondent again said: "Don't move or I'll shoot." He then turned, put the shotgun under his coat and left.

Mrs. Mary Heckroth, Mr. Celona's sister, testified that she was in another room of the house on the night of the robbery. Hearing a scuffle, she went to the dining room and observed the robbers. Respondent was holding a shotgun. After imploring Davis not to hurt anyone, she saw that her parents were coming into the room. Taking advantage of this opportunity to slip away, she crept upstairs to the front bedroom, locked the door and called to her niece who lived in the apartment building across the street. After telling her niece to phone the police, Mrs. Heckroth saw the defendants run to a blue-green Chev-

rolet and drive off. Mrs. Heckroth's niece, Mrs. Gloria Donhauser, corroborated the fact that Mrs. Heckroth had called to her and asked her to phone the police. She added that she had also seen two men run from the Celona home to a blue-green Chevrolet.

The remainder of the State's case in chief consisted of the testimony of several police officers. A blue 1965 Chevrolet with Maryland license plates was found abandoned near the Garden State Parkway at about 10:00 p.m. the same night. The motor was still running. A fingerprint check of the car showed readable thumbprints on the rear view mirror which matched the prints of respondent and Davis.

Respondent and Davis were apprehended, along with one Neal, on October 14, 1968, in a motel room in Camden. Also seized in the motel room were a black briefcase, a knife and a pistol.

Each defendant presented a separate alibi defense. Miss Wanda Williams, respondent's cousin, and Mrs. Evelyn Barber testified that they had accompanied respondent on an automobile trip to Illinois. The trip had begun on October 1, 1968, and the group stayed in Illinois for six or seven days, returning to Atlantic City on October 7 or 8, 1968. Mrs. Mary Ann Williams, respondent's aunt, testified that she had lent her car to respondent on October 1, 1968, so that he could drive to Illinois and retrieve some personal papers for her. Respondent returned the car and gave her the papers on October 7 or 8, 1968. Respondent did not testify.

On rebuttal, the State called William Oscar Harris, respondent's parole officer. Over defense objections, Harris stated that he had known respondent for three years and had spoken with him in November of 1968. During that conversation, respondent had informed that he had been

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in Camden on October 4, 1968, in the company of Bobby Hines, Cleo Moore, and two individuals whose first names were Paul and Louis. Additionally, respondent had told him that on October 6, 1968, he was living at 113 Spruce Street in Newark. Respondent had stated that he did not return to Atlantic County until October 11, 1968.

On cross-examination, it was elicited that Harris was respondent's parole officer and that respondent was obliged to remain within the State as a condition of parole. Harris related that he had interviewed respondent concerning his whereabouts in October of 1968. Harris added that his investigation had adduced nothing to indicate that respondent was not in Illinois from October 1 to 8, 1968.

On May 28, 1971, the jury found respondent and his codefendant guilty of armed robbery. Both respondent and Davis appealed their convictions, which were affirmed on February 20, 1974, by the Appellate Division of the Superior Court. (Appendix B).

Respondent and Davis then filed a joint petition for certification with the Supreme Court of New Jersey. The petition was granted on May 29, 1974. 65 N. J. 298, 321 A. 2d 259. On April 22, 1975, that Court ruled that respondent's conviction must be reversed on the ground that the admission of the testimony of the parole officer had violated respondent's right to avoid compulsory self-incrimination as guaranteed by the Fifth Amendment of the United States Constitution. (Appendix A).

The State of New Jersey now petitions this Court for review of the important Fifth Amendment issues raised herein.

REASONS FOR GRANTING THE WRIT

POINT I

Whether an interview between a parole [or probation] officer, who is acting in the normal course of his duties, and his client, then incarcerated on new charges of criminal wrongdoing, must be preceded by compliance with *Miranda* if the statements given by the client are to be admissible against him at a later trial.

Petitioner contends that an important question is presented regarding the spirit and letter of the *Miranda* decision as it relates to the administration of parole and probation programs. Specifically, the New Jersey Supreme Court declared that statements given by a parolee, respondent, to his parole officer would be available for use in any future parole revocation proceeding, although no *Miranda* warnings were given and the interview took place at the jail where respondent had been incarcerated for his suspected participation in a robbery. However, the court ruled that use of those statements at respondent's subsequent trial "implicated" respondent's constitutional rights and required compliance with *Miranda* as a prerequisite to admission. The court reached these conclusions notwithstanding that it found that the parole officer was acting within the scope of his usual duties in interviewing respondent concerning matters pertinent to his parole status. Moreover, the court described a parole officer as "a guide and counselor" whose function is to assist the parolee to "achieve and maintain rehabilitation," and the court acknowledged that in order to "work effectively the parole officer must know the parolee's whereabouts and activities both social and business." (See Appendix A).

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Petitioner submits that the New Jersey Supreme Court seriously misapprehends the thrust, motivation and objectives of the *Miranda* decision. Put simply, the dialogue between a parole or probation officer and his client is not "custodial interrogation" within the meaning of *Miranda*, regardless of whether the client is in custody on a new criminal charge. A parole officer in New Jersey is simply not a "law enforcement officer," but rather a social case worker dedicated to the rehabilitation and development of his client. See *Morrissey* v. *Brewer*, 408 U. S. 471, 485 (1972). Such officers are not afforded the broad powers customarily wielded by police and other law enforcement officers. Indeed, they are not even permitted to arrest a parolee unless first directed to do so by the parole board or by the chief executive of the parolee's institution, or unless they first receive the approval and permission of the parole division to make such an arrest under emergency conditions. N.J.S.A. 30:4-118, N.J.S.A. 30:4-123.22; N.J.S.A. 30:4-123.28.* In short,

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* N.J.S.A. 30:4-118 provides:

> A warrant for the arrest of any institutional inmate who shall have left the institution without parole or discharge or whose parole has been revoked, may be served by the chief executive officer, or his special officer or the regularly appointed parole officer or any person authorized to serve criminal process, in any county of this state. If the person for whom such warrant has been issued is confined elsewhere in this state, the service of the warrant upon the warden or chief executive officer of the institution wherein such person is confined, shall require him to facilitate the return of the person named in the warrant upon the expiration of the pending confinement. The chief executive officer, or the parole officer, may without warrant apprehend any paroled person and cause him or her to be detained in any city or county jail or returned to the institution, to wait the determination of the board of managers as to the revocation of parole.

(Footnote continued on following page)

they are not concerned with the detection of crime and the apprehension and conviction of criminals, but with the salvation of the individual entrusted to their supervision and care. See, Sigler and Bezanson, *Role Perception Among New Jersey Probation Officers*, 2 *Rutgers—Cam-*

(Footnote continued from preceding page)

N.J.S.A. 30:4-123.22 provides:

> If the parole officer having charge of a paroled prisoner shall have reasonable cause to believe that a parolee has resumed, or is about to resume, criminal conduct or associations, or has violated the conditions of his parole in any important respect, and the situation is one of immediate emergency that cannot await the next regular or special meeting of the board, then such parole officer shall notify the parole division which may, if the facts warrant, treat the parolee as delinquent on parole. By his own warrant the parole officer may apprehend any such delinquent parolee and cause his return to the institution from which released or cause his immediate confinement in an appropriate county or municipal jail, penitentiary or lockup. Such retaking and detention shall continue under authority of the parole officer's warrant for a period of 30 days and until the next regular or special meeting of the board thereafter, at which time the board shall consider his case and render its decision as to the revocation of his parole or his return to the community on his original parole. Such warrant shall be in the form to be prescribed by the parole division and, when signed by the parole officer in charge of the case, shall be sufficient warrant and authority to all peace officers to assist in the apprehension of the prisoner and shall be also sufficient authority for the detention of the prisoner in the institution from which released or in a municipal or county jail, penitentiary or lockup. In such case, credit shall be given the prisoner on his sentence for time spent in such custody while awaiting the decision of the board as to revocation of his parole.

(Footnote continued on following page)

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den L. J. 251 (1970). Hence, there does not exist an adversarial relationship between a parole or probation officer and his client, but one of cooperation and assistance. Compare *Mathis* v. *United States*, 391 U. S. 1 (1967). Absent the inherently compelling factors which prompted creation of the *Miranda* rule to protect cherished Fifth Amendment rights against the overbearing of law enforcement officials, imposition of the *Miranda* prophylactic rule upon the relationship between a parole or probation officer and his client is both unnecessary and undesirable.

While the present question is of obvious importance to the State of New Jersey, it carries much broader significance. A number of cases from other jurisdictions, both state and federal, have dealt with this identical issue. Those holding that the statements could not be introduced at the subsequent criminal trial of the probationer or parolee because the probation or parole officer did not comply with *Miranda* are: *State* v. *Gallagher*, 39 Ohio St. 2d 291, 67 Ohio Ops. 2d 354, 313 N. E. 2d 396 (1974), *cert.* granted *sub nom. Ohio* v. *Gallagher*, 95 S. Ct. 1445

(Footnote continued from preceding page)

N.J.S.A. 30:4-123.28 provides:

> If the prisoner who has been declared delinquent on parole is at liberty, then a warrant for his retaking and reimprisonment shall issue and may be served upon him by any parole officer, agent of the board or peace officer otherwise authorized by law to serve warrants and make arrests. Such warrants shall be in form to be prescribed by the board and shall be signed by one of the members thereof, or its duly constituted agent for the arrest of the prisoner and for his return to and confinement in the institution from which he was paroled, until the expiration of the maximum sentence imposed upon him or until further order of parole by the board.

(1975); *United States* v. *Deaton*, 468 F. 2d 541 (5 Cir. 1972); *State* v. *Williams*, 486 S. W. 2d 468 (Mo. Sup. Ct. 1972); and *State* v. *Lekas*, 201 Kan. 579, 442 P. 2d 11 (1968). A similar result was reached in the pre-*Miranda* decision in *People* v. *Gastelum*, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (Dist. Ct. App. 1965). It should perhaps be noted that in *Williams* and *Gastelum*, the parole officers performed much like policemen in an apparent effort to prove the parolee guilty of the new offense. And, in *Lekas* the Kansas Supreme Court ruled that Kansas parole and probation officers are, by statute, law enforcement officers. There also, the parole officer conducted himself more in the manner of a police officer than a parole officer in the usual sense.

At least two states have squarely held that a parole or probation officer is not a law enforcement officer and, therefore, is not bound by the *Miranda* rules when interviewing a client, even where the client is in custody and the client's statements are later introduced against him at his criminal trial. *State* v. *Johnson*, 202 N. W. 2d 132 (S. D. Sup. Ct. 1972); *Nettles* v. *State*, 248 So. 2d 259 (Fla. Dist. Ct. App. 1971). One court allowed such statements to be introduced on the ground that they were volunteered to the defendant's federal parole officer and not the subject of compulsion or coercion. *Gilmore* v. *People*, 171 Colo. 358, 467 P. 2d 828 (1970). Although addressing the question whether similar statements could be properly introduced at a probation revocation hearing, the New York Court of Appeals has indicated that it generally does not consider parole or probation officers to be law enforcement officers within the intendment of *Miranda*. *People* v. *W.*, 24 N. Y. 2d 732, 302 N. Y. S. 2d 260, 249 N. E. 2d 882 (1969).

Petitioner submits that these opinions demonstrate the far-ranging implications of the present question. More-

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over the plain lack of unanimity among those courts which have considered the problem evidences the need for this Court to resolve this matter. That the question is worthy of this Court's time and energies is yet further apparent from the fact, already noted above, that this Court has granted certiorari to the Supreme Court of Ohio to review a virtually identical issue to that which is presented here. *Ohio* v. *Gallagher, supra* (No. 74-492). Petitioner, therefore, respectfully urges this Court to consider the question presented to the end that the delicate relationship between a parole or probation officer and his client will not be needlessly strained and the due administration of justice will not be unnecessarily hampered.

POINT II

Whether the Fifth Amendment requires that a defendant's voluntary and uncoerced statements, obtained without compliance with the procedural safeguards of *Miranda*, may be used by the prosecution at trial only to impeach the position there espoused by the defendant or whether the statements may be introduced on rebuttal not only to impeach the defense but to prove the matter asserted.

An important question relating to the scope and efficiency of the exclusionary rule announced in *Miranda* and refined in *Harris* v. *New York*, 401 U. S. 222 (1971), is presented for consideration.

In *Miranda*, this Court declared that the practice of "custodial interrogation" includes many inherently compelling aspects which pose grave dangers to the free exercise of the privilege against self-incrimination. Due to the variety and nature of those compelling factors, the

Court instituted a number of procedural safeguards designed to prevent the erosion of the privilege. In essence, the Court set up a presumption that statements obtained from an accused as a result of *incommunicado* questioning in a police dominated atmosphere were not the product of an unfettered and voluntary decision to speak, *i.e.*, they were presumed to have been compelled. To overcome that presumption, law enforcement officers were obliged to comply with the now familiar *Miranda* rules. To further assure compliance, an exclusionary rule was established which forbade the prosecution from proving its case by virtue of any statements obtained in violation of *Miranda*. Thus, a protective shell was constructed around the privilege and a *per se* rule of exclusion was invoked to insure that the shell, as well as the right, remained intact. As the *Miranda* Court itself recognized, "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker*, 417 U. S. 433, 94 S. Ct. 2357, 2364 (1974).

While it is evident, then, that the Fifth Amendment right not to be compelled to be a witness against oneself is not necessarily violated by a failure to comply with the prophylactic requirements of *Miranda*, the presumption continues that such a failure does cause a breach of the right. However, that presumption is not absolute. As demonstrated by this Court's opinion in *Tucker*, an examination of the circumstances of the interrogation in a given case may well disclose that the interrogation involved no compulsion, despite the disregard of *Miranda's* requirements. *Michigan* v. *Tucker*, *supra*, 94 S. Ct. at 2364.

That every failure to comply with *Miranda* does not, in fact, lead to a violation of the Fifth Amendment was

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recognized prior to *Tucker* in *Harris* v. *New York*, *supra*. There, the issue was whether the exclusionary policy of *Miranda* should prevent the prosecution from impeaching a defendant who testified at trial inconsistently with his prior statements to the police. Although the failure of the police to fully comply with *Miranda* was acknowledged, the Court nevertheless found that the statements were neither coerced nor involuntary. *Id.* at 223-24. With the actual Fifth Amendment right thus satisfied, the Court was asked to decide how rigidly the exclusionary rule of *Miranda* was to be applied in order to deter future non-compliance. Concededly, the factual question then before the Court concerned only the propriety of employing the prior statements to impeach credibility and, as the Court noted in its relation of the facts, the trial court had instructed the jury to use the evidence for that purpose only. However, in reasoning to the conclusion that this procedure was proper, the Chief Justice, writing for the majority, pointedly spoke in terms which were not restricted to the peculiar facts before the Court. Avoiding any statement that the limiting instruction given below was constitutionally required, he declared:

> *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards. *Id.* at 224.

After then discussing the valuable benefit of confrontation with prior statements as a truth testing device, the Chief Justice again delineated the proper scope and function of the *Miranda* exclusionary rule.

> Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. *Id.* at 225.

Recently, in *Oregon* v. *Hass*, —— U. S. ——, 95 S. Ct. 1215 (1975), the *Harris* decision was reaffirmed in a factual context which again involved use of the prior statements to impeach a defendant's credibility. Significantly, *Hass* quoted the above passages from *Harris* with approval and did not indicate that the attempted limitation of the jury's use of the statements to impeachment was constitutionally mandated.

Petitioner here submits that the opinion in *Harris* and *Hass* purposely left unresolved the extent to which the prosecution may employ voluntary and uncoerced statements obtained in violation of *Miranda*. It is petitioner's view that such statements may be introduced by the prosecution on rebuttal, where the defense has advanced a material contention at trial which is flatly opposed by the prior statements. Moreover, the use of these statements, once properly admitted, need not be restricted to impeachment but may be considered by the jury for the truth of the matter asserted therein.

As stated in *Harris*, the exclusionary policy is satisfied and the full deterrent effect is achieved where the prosecution is unable to employ the statements in its case in chief. The case against the accused will then stand or fall in the first instance without benefit of the prior statements and, if the defendant does not forward a conflicting claim at trial, the statements will never be admitted. The suggested procedure would serve the ends of justice without eroding the effectiveness of the ex-

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clusionary policy as a deterrent. Of course, a rule which excludes reliable and material evidence should be only as broad as is necessary to fulfill the purpose for which it was intended. *Elkins* v. *United States*, 364 U. S. 206 (1960).

In the instant case, the Appellate Division of the New Jersey Superior Court affirmed respondent's conviction, although the *Miranda* violative statements which were introduced on rebuttal by the State were not the subject of a jury instruction limiting their admission to impeachment only. The Appellate Division, relying upon the declarations in *Harris* quoted above, concluded that *Harris* had not elevated such a limiting instruction to the level of a constitutional command. (See Appendix B). The Supreme Court of New Jersey disagreed and ruled that such use of the prior statements "in rebuttal as substantive evidence is contrary to *Miranda* and cannot stand." (See Appendix A). Thus, the present matter clearly raises the issue under discussion.

Petitioner respectfully urges that this Court accept this case for review in order to provide guidance to courts and prosecuting authorities throughout the nation on this obviously substantial question. The rationale of *Harris* and *Hass* would appear to authorize what was done here. In order to fairly seek a just result, the jury must be allowed to fully consider all of the trustworthy evidence before it. To permit the New Jersey Supreme Court's ruling to stand and to leave uncorrected this same misapprehension in other jurisdictions would stifle the ability of the trial process to ferret out truth while providing no real compensatory benefit to any competing interest. Moreover, the efficacy of an instruction, which purports to prevent the jury from considering the substance of uncoerced and often highly incriminating statements made by the defendant himself, is more imagined than real.

See *Bruton* v. *United States*, 397 U. S. 123 (1968); compare *Jackson* v. *Denno*, 378 U. S. 368 (1964); see *McCormick, Evidence*, § 251, p. 604 (2d ed. 1972). When important constitutional principles are presumed to turn on such a questionable distinction, this Court should examine the issue to determine whether, in fact, that distinction is valid.

POINT III

This Court should determine whether the sound principles of *Harris* v. *New York* are to be so artificially limited that a defendant who does not personally testify in his own behalf may proffer, through others, a fabricated defense without fear of contradiction by his prior statements which are voluntary and uncoerced, though obtained without compliance with *Miranda*.

In *Harris* v. *New York*, this court recognized that a balance must be struck between the exclusionary policy of *Miranda* and the fundamental goal of ascertaining the truth at a criminal trial. As noted above, *Harris* declared that sufficient deterrence to noncompliance with *Miranda* is achieved if the statements, otherwise voluntary and uncoerced, which are obtained in violation of *Miranda*, are not available to the prosecution on its case in chief. The *Harris* Court went on to hold that the act of a defendant in testifying inconsistently with his prior statements created the necessity of allowing the prosecution to confront the defendant with those statements.

> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. *Id.* at 226.

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In the instant case, respondent's admittedly voluntary statements to his parole officer declared that he had been in Camden, New Jersey, at the time of the robbery. The crime occurred in Pleasantville which is not located in the same county (Atlantic) as Camden. In addition, respondent had given his parole officer the names of four individuals whom he claimed were with him in Camden that day. Assuming for the sake of argument that *Miranda* applied to the interview between respondent and his parole officer, it is conceded that the parole officer did not comply with the dictates of that case. At trial respondent produced three witnesses, none of whom were named in his prior statements, to present his alibi defense. They testified that respondent had been in Illinois on an errand during the time of the robbery. Respondent did not testify in his own behalf. In rebuttal, the prosecution introduced respondent's prior statements which were in clear contradiction to his proffered defense.

On appeal, the Appellate Division held that the prosecution was properly permitted to inform the jury that respondent had previously taken a position contrary to that vicariously espoused at the trial. After noting that *Harris* had arisen in a context where the "non-*Miranda*" statement was used in cross-examination to attack the credibility of a defendant who had personally testified in his own behalf, the Appellate Division reasoned that the rationale of *Harris* would also permit the prosecution to meet a fabricated defense as here.

> We think it clear that if *Miranda* cannot be converted into a license to commit perjury, it cannot also exist as a license to suborn it. In light of *Harris* there is no just reason to frustrate truth in the criminal process by forcing the State to withhold from legitimate rebuttal a voluntary state-

ment of the accused inadmissible solely because it was taken in violation of *Miranda*. (See Appendix B).

The New Jersey Supreme Court rejected this thinking and, reading *Harris* as strictly limited to the facts of the case, declared that "the non-*Miranda* statement was not admissible for any purpose since Pace [respondent] did not testify as a witness." (See Appendix A).

Petitioner submits that in so truncating the *Harris* decision, the New Jersey Supreme Court failed to comprehend the underlying rationale and purpose of *Harris*. In the situation presented, every factor which motivated the Court in *Harris* (and more recently in *Hass, supra*) to justify admission of a non-*Miranda* statement was present. Here again, no loss of deterrence to future noncompliance with *Miranda* would result if the evidence is admitted, but a serious impediment to the jury's task of ascertaining the truth would be interposed if it is excluded. Moreover, correction of the error of the New Jersey Supreme Court is not only crucial to the due adminstration of justice in New Jersey, for this same misconception appears likely to be repeated in cases arising in other jurisdictions. This will be especially so if the New Jersey decision is permitted to stand and future defendants perceive the ease with which they can circumscribe traditional truth-testing procedures.

That rebuttal of the defense in the manner espoused here is valuable and accepted is clear. See II *Wigmore, Evidence*, §278(2), p. 120 (3d Ed. 1940). That the sound principles of *Harris* and *Hass* may be rendered hollow by the simple variant, whereby the defendant affirmatively presents a fabricated defense through willing friends and associates, is unthinkable. This Court should review this significant question to expound upon the tenets em-

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braced in *Harris* and to prevent this respondent and future defendants from being allowed to deceive a jury with impunity through a perversion of the *Miranda* protections. Such trickery breeds disrespect for the rule abused and for the criminal justice system generally. Therefore, petitioner respectfully urges this Court to review this matter and to render the appropriate remedial ruling.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari to the New Jersey Supreme Court be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

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APPENDIX A

Opinion of the Supreme Court of New Jersey

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND DAVIS AND ERNEST PACE,

Defendants-Appellants.

Argued November 19, 1974—Decided April 22, 1975.

Mr. Edward Weisslitz, First Assistant Deputy Public Defender, argued the cause for defendants-appellants (*Mr. Stanley C. Van Ness,* Public Defender, attorney).

Mr. Robert J. Genatt, Deputy Attorney General, argued the cause for plaintiff-respondent (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by

SULLIVAN, J. Defendants were tried by jury and convicted of armed robbery. Davis was sentenced to 7-10 years and Pace 12-15 years, both sentences to be served in State Prison.

On appeal, the judgments of conviction were affirmed by the Appellate Division in an opinion reported in part at 127 N. J. Super. 55 (1974). This Court granted certification. 65 N. J. 298 (1974).

Appendix A

The State produced evidence that on October 4, 1968, Joseph Celona of Pleasantville, N. J. was in the dining room of his home counting the day's receipts from his retail store. His sister and their elderly parents were sitting in the living room. When Celona opened the front door in response to a knock, defendants forced their way into the house announcing a "stick up." Pace was armed with a shotgun and Davis with a pistol. Defendants took some $1200 to $1500 in cash and checks from Celona.

Neither Davis nor Pace testified at trial. Instead they offered alibi witnesses as to their respective whereabouts elsewhere at the time of the robbery. Pace's alibi, which is the only one material to this appeal, was that he was in Chicago on October 4, the date of the robbery.

To rebut Pace's alibi testimony the State called William Harris who testified that he had a conversation with Pace on November 14, 1968 and that Pace told him he was in Camden on October 4, Newark after that, and did not return to Atlantic City where Pace lived until October 11. The State did not attempt to show that Harris was Pace's parole officer and that Pace was then on parole from a previous conviction.

At the conclusion of Harris' direct examination, counsel for Pace made a motion for a mistrial on the ground that Harris' testimony was very prejudicial to his client's case. Counsel claimed that in order to explain why Pace had not told Harris the truth about his whereabouts on October 4, it would be necessary to bring out the fact that Harris was a parole officer and that Pace was on parole from a previous conviction at the time. The motion was denied.

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Appendix A

On cross-examination it was brought out by Pace's attorney that Harris was a parole officer and that on October 4 Pace was on parole from a previous conviction and that the conversation with Pace had been for the purpose of determining his whereabouts in October of 1968 since leaving the State without permission could be grounds for revocation of parole. It was also brought out that Pace was incarcerated in jail at the time Harris spoke with him. As heretofore noted, both defendants were convicted.

[1] On their appeal to this Court defendants seek to argue that certain trial evidence presented by the State connecting them with the getaway car was barred by the doctrine of collateral estoppel. This contention was not made at trial nor did defendants place in evidence material in support of any such contention. See *State* v. *Ebron*, 61 N. J. 207 (1972).[1] Defendants' supplemental letter-brief filed with the Appellate Division made this argument for the first time, but did so on an inadequate record resulting in that court attempting to decide the issue on a factually incorrect assumption.

Defendants' petition for certification does not mention collateral estoppel as an issue in the statement of questions presented. The sole reference in the petition to the evidence concerning the getaway car is defendants' erroneous statement that "[a]t the trial, both petitioners urged that the State was collaterally estopped from introducing the petitioner's [sic] connection with the blue-green Chevrolet."

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[1] About a month prior to the armed-robbery herein, defendants had been tried on a charge of unlawful possession of a stolen motor vehicle (the getaway car) and had been acquitted.

Had defendants made a timely objection at trial, raised the issue of collateral estoppel with regard to the State's proofs connecting defendants with the getaway car and placed in evidence material in support of their contention, the trial court would have had the opportunity to rule on the question having before it a record on which it could make a determination. However, to wait until this late stage to raise the issue properly or to submit adequate material[2] in support of defendants' contention frustrates the administration of justice and cannot be sanctioned, absent a showing of fundamental error and manifest unfairness to defendants.

But that is not the situation here presented. The State presented positive eyewitness identification of defendants as the robbers. The evidence connecting them with the getaway car was not vital to the State's case. In the circumstances, defendants will not now be heard on the matter of collateral estoppel. *State* v. *Ebron, supra.*

The remaining issue concerns the admission in evidence of the parole officer's testimony as to the statement Pace made to him about his whereabouts during the month of October 1968. Objection was made that the statement was inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), because Pace had not first been advised of his constitutional rights. However, the trial court ruled that *Miranda* had no application to a situation where a parolee was questioned by his parole officer.

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[2] On the appeal to this Court defendants were granted leave to expand the record and to submit a full transcript of the earlier trial on the charge of unlawful possession of a stolen motor vehicle.

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The Appellate Division agreed that the statement was admissible, but rested its decision on a basis other than that given by the trial court. In effect, the Appellate Division held that even if the *Miranda* rule were applicable to Pace's statement to his parole officer, so that such statement would not have been admissible as part of the State's case in chief, nevertheless it could be presented in rebuttal under *Harris* v. *New York*, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) as an admission of Pace to refute the testimony of his alibi witnesses.

[2] It is clear that the *Miranda* rule is not applicable to the routine parole interview between a parole officer and a parolee. A parole officer acts as a guide and counselor to the parolee in his efforts to achieve and maintain rehabilitation. To work effectively the parole officer must know the parolee's whereabouts and activities both social and business. Routine conditions of parole state that the parolee is to report regularly to his parole officer and make a full disclosure of the foregoing. These routine reports and interviews are invariably non-custodial and, therefore, outside the ambit of *Miranda*. Moreover, implicit in the relationship is the requirement that the parolee cooperate fully and unreservedly in the parole experiment.

However, this is not the situation presented in this case. Pace was in jail charged with having committed an armed robbery when he was questioned by his parole officer. Obviously the officer knew of the charge against Pace since the questions asked related to Pace's whereabouts on and about the date of the robbery.

Admittedly, the questioning was pertinent as to whether or not Pace was adhering to the conditions of his parole

so that the statement Pace gave at that time would be a part of his parole record and available in any future parole proceedings.

[3] However, to attempt to use that in-custody statement outside the framework of the parole system and at Pace's subsequent criminal trial on the charge of armed robbery, implicated defendant's constitutional rights and would require a showing that Pace had first been advised of such rights under *Miranda* and had knowingly and voluntarily waived them.

The Appellate Division held that even if the *Miranda* rule applied to the use of Pace's statement at his subsequent trial for armed robbery, so that it would not have been admissible as part of the State's case in chief, nevertheless, it could be presented in rebuttal, under *Harris* v. *New York*, *supra*, as an admission of Pace to refute the testimony of his alibi witnesses.

Harris holds that while an in-custody statement taken from a defendant by a law enforcement officer without first complying with the *Miranda* rule may not be used by the state as part of its case in chief, if the defendant takes the stand as a witness and gives testimony which is at variance with what was said in the statement, the statement, if it otherwise satisfies standards of admissibility, may be used to impeach defendant's credibility as a witness.[3]

[4] We conclude that the Appellate Division holding was erroneous in the following particulars. As heretofore

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[3] The *Harris* rationale was recently reaffirmed by the United States Supreme Court in *Oregon* v. *Hass*, —— U.S. ——, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975).

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noted, the statement was not admissible as substantive evidence as part of the State's case in chief. It only had evidential value if Pace took the witness stand and gave testimony at variance with what he said in the statement. It could then be used to impeach his credibility as a witness. But Pace never took the witness stand and his credibility as a witness never became an issue in the case. Here the Appellate Division held that the statement could be used as an admission by Pace to rebut the testimony of the alibi witnesses. This ruling permitting use of the statement in rebuttal as substantive evidence is contrary to *Miranda* and cannot stand. We hold that the non-*Miranda* statement was not admissible for any purpose since Pace did not testify as a witness. Even if he had taken the witness stand and testified that he was in Chicago on October 4, 1968, use of the statement would have been limited to impeaching his credibility as a witness. It could not be substantive proof of his whereabouts. We have held to the same effect in *State* v. *Miller*, 67 N. J. 229, decided by us this day.

Our decision requires that the conviction of Pace be reversed and a new trial ordered as to him. However, the error we find does not infect defendant Davis' conviction despite his assertion to the contrary. The judgment of conviction as to him is affirmed.

Pashman, J. (Concurring in result only). The majority reverses the conviction of Pace on the grounds that the statements made to his parole officer should have been excluded because the parole officer failed to give him the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It also holds that the exception to this rule created by *Harris* v. *New York*, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971),

allowing the use for purposes of impeachment of statements taken from a defendant in violation of *Miranda*, *cf. Oregon* v. *Hass*, —— U. S. ——, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975), does not apply here because defendant did not testify in his own behalf. With these holdings I am in full agreement. The majority opinion, though, goes on to imply approval of the *Harris* exception. The desirability of adopting *Harris* as a matter of state law need not be considered in this case, and I would not do so. My views on this issue are fully set out in my dissent to *State* v. *Miller*, 67 N. J. 229 (1975), also decided today.

PASHMAN, J., concurring in result.

For reversal in part and affirmance in part—Chief Justice HUGHES, Justices JACOBS, MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD and Judge COLLESTER—7.

Opposed—None.

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APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

Superior Court of New Jersey
Appellate Division

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND DAVIS AND ERNEST PACE,

Defendants-Appellants.

Submitted October 24, 1973—Decided February 20, 1974.

Before Judges HANDLER, MEANOR and KOLE.

Mr. Stanley C. Van Ness, Public Defender, attorney for appellants (*Mr. Edward Weisslitz,* First Assistant Deputy Public Defender, of counsel and on the brief).

Mr. George F. Kugler, Jr., Attorney General, attorney for respondent (*Mr. Robert J. Genatt,* Deputy Attorney General, of counsel, and *Messrs. Willard E. Byer, Jr.* and *Alfred J. Luciani,* Deputy Attorneys General, on the brief).

The opinion of the court was delivered by

MEANOR, J. A. D. These defendants appeal their conviction for armed robbery. The offense took place Octo-

ber 4, 1968 at the home of Joseph Celona, Pleasantville, New Jersey. At the time Celona was at the dining room table counting the day's receipts from his retail store. In the living room of the home were Mrs. Mary Heckroth, who is Celona's sister, and their elderly parents. When Celona answered a knock on the door, defendants entered, announcing "This is a stick up." Defendant Ernest Pace had a shotgun and defendant Raymond Davis brandished a pistol. The thieves took $1,200 to $1,500 in cash and checks.

I

Both defendants offered an alibi. Pace did not testify but produced three witnesses who claimed that he was in Chicago at the time of the offense. His aunt, Mary Ann Williams, testified that on October 1 Pace left for Chicago in her car to obtain some personal papers she had left there. He returned October 8. Mrs. Evelyn Barber, Pace's fiancee, said that she, Wanda Williams and another young woman had accompanied Pace to Chicago, leaving New Jersey October 1 and returning about October 8. Miss Williams, Pace's cousin, also corroborated the alibi. The other participant in the trip did not testify because, it was said, she remained in Chicago. Obviously, the jury did not believe the alibi.

To rebut the alibi the State called William Harris. He testified that he had a conversation with Pace on November 14, 1968, during which Pace claimed that he was in Camden on October 4 and in Newark after that, returning to Atlantic City on October 11. Neither Harris' occupation nor his reason for the conversation with Pace was brought out on direct. Harris was in fact Pace's parole

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officer, and Pace was on parole at the time of the Celona robbery.

Disregarding his attorney's advice, Pace had it brought out on cross-examination that Harris was a parole officer, that Pace was on parole on October 4, and that his departure from the State without permission would have been a violation of parole. It was also established that the interview by Harris took place while Pace was confined in the Atlantic County Jail. Proper objection was made to Harris' testimony on the ground that its admission violated *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[1] *Miranda* bars from evidence statements taken by law enforcement officers as a result of custodial interrogations unless prior thereto the accused has been advised of a well-known litany of rights and has knowingly and voluntarily waived them. *State* v. *Hampton,* 61 N. J. 250, 265 (1972); *Mathis* v. *United States,* 391 U. S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

We need not decide whether the interrogation by Harris, directed solely to Pace's parole and not part of an ongoing investigation of a subsequent crime, required the *Miranda* warnings. We hold that the exclusionary rule of *Miranda* does not reach the State's presentation of Harris' testimony in rebuttal.

[2] That *Miranda* does not bar all use of voluntary in-custody statements taken by law enforcement officers in the absence of the required warnings and a waiver thereof was made clear in *Harris* v. *New York,* 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). Here, as in *Harris,* no question has been raised concerning the voluntariness of the statements involved. *Harris* held that a defendant's

non-*Miranda* statement, while not available during the State's case in chief, could be used to affect the defendant's credibility. The *Harris* rationale of permitting the impeachment use of evidence not available to the State on its main case is not a new one. Annotation, "Impeachment of accused as witness by use of involuntary or not properly qualified confession," 89 A. L. R. 2d 478 (1963). *Harris* was anticipated by this court in *State* v. *Kimbrough*, 109 N. J. Super. 57, 65-68 (App. Div. 1970). See also, *State* v. *Slobodian*, 120 N. J. Super. 68 (App. Div. 1972), certif. den. 62 N. J. 77 (1972).

[3] It is true that *Harris* arose in a context where the non-*Miranda* statement was used in cross-examination followed by an instruction that the statement could only be considered by the jury in assessing the defendant's credibility and not as evidence of guilt. We do not read *Harris*, however, as elevating such a limiting instruction to the level of a constitutional command. During the course of its opinion the court said:

> Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. (401 U. S. at 225, 91 S. Ct. at 645.)

and further:

> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. (401 U. S. at 226, 91 S. Ct. at 646.)

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Appendix B

We think it clear that if *Miranda* cannot be converted into a license to commit perjury, it cannot also exist as a license to suborn it. In light of *Harris* there is no just reason to frustrate truth in the criminal process by forcing the State to withhold from legitimate rebuttal a voluntary statement of the accused otherwise inadmissible solely because it was taken in violation of *Miranda*. The testimony of Harris was properly admitted in rebuttal as an admission of defendant Pace.[1]

We are not implying that the door is now open to the acceptance in rebuttal of non-*Miranda* statements as sub-

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[1] The State offers an alternate hypothesis to sustain admission of Harris' evidence which we note but do not pass on. The thesis is that because of the special relationship between a parolee and his parole officer, interrogations by the latter are outside *Miranda*. The cases agree that a parole officer may testify in a parole revocation hearing concerning admissions secured from the parolee by an interrogation not preceded by *Miranda* warnings even where that interrogation took place in a custodial setting. *People* v. *W.*, 24 N. Y. 2d 732, 302 N. Y. S. 2d 260, 249 N. E. 2d 882 (Ct. App. 1969); *Clark* v. *State*, 222 So. 2d 766 (Fla. D. Ct. App. 1969); *State* v. *Jackson*, 16 Ariz. App. 476, 494 P. 2d 376 (Ct. App. 1972). Courts have split upon the issue of whether the results of a parole officer's questioning, aimed solely at the parole function and not preceded by *Miranda* warnings, may be admitted in a prosecution for a new offense. Answering in the negative is *State* v. *Lekas*, 201 Kan. 579, 442 P. 2d 11 (Sup. Ct. 1968), while *Nettles* v. *State*, 248 So. 2d 259 (Fla. D. Ct. App. 1971) takes the opposite view. Compare, however, *Mathis* v. *United States*, *supra*, and see also *State* v. *Barnes*, 54 N. J. 1 (1969), *cert.* den. 396 U. S. 1029, 90 S. Ct. 580, 24 L. Ed. 2d 525 (1970). It might also be noted that where the parole relationship was perverted by using it as a subterfuge for an investigation into a subsequent offense, the results of that endeavor were held inadmissible. *People* v. *Way*, 65 N. Y. Misc. 2d 865, 319 N. Y. S. 2d 16 (Cty. Ct. 1971).

stantive proof in virtually every case where defense evidence is offered. We stress that such statements can only be received as *legitimate* rebuttal. Thus, the essential prelude to admissibility is that the conflict between defense proofs and the non-*Miranda* statement must be in sharp focus.[2]

(The court here considered other points raised by defendant and found them without merit.)

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[2] *Cf. State* v. *Burt*, 107 N. J. Super. 390 (App. Div. 1969), aff'd o. b. 59 N. J. 156 (1971), *cert.* den. 404 U. S. 1047, 92 S. Ct. 728, 30 L. Ed. 2d 735 (1972), writ of *habeas corpus* granted *sub. nom. United States ex rel. Burt* v. *Yeager*, 342 F. Supp. 188 (D. N. J. 1972), rev'd *sub. nom. United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234 (3 Cir. 1973), *cert.* den. *sub. nom. Burt* v. *New Jersey*, 414 U. S. 938, 94 S. Ct. 243, 38 L. Ed. 2d 165 (1973). Compare *State* v. *Griffin*, 120 N. J. Super. 13 (App. Div. 1972), certif. den. 62 N. J. 73 (1972).

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